IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22810 of 2005
With
SPECIAL CIVIL APPLICATION No. 24745 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHANTABEN NANJIBHAI PATEL - Petitioner(s)
Versus
RAMIBEN RAMABHAI PARMAR & 5 - Respondent(s)

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Appearance :
MR VIJAY PATEL for HL PATEL ADVOCATES for Petitioner(s) : 1,
MR ND NANAVATI for NANAVATY ADVOCATES for Respondent(s) : 1,
MR NV ANJARIA for Respondent(s) : 4.
None for Respondent(s) : 5,
MR AJ DESAI, AGP for Respondent(s) : 2, 3, 6,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 21/02/2006
COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

Smt Shantaben Nanjibhai Patel, a councillor in Idar Municipality has filed Special Civil Application No. 22810 of 2005 challenging the decision of the Election Officer & Special Land Acquisition Officer, Sabar Kantha District at Himmatnagar declaring Smt Ramiben Ramabhai Parmar (the first respondent in the said petition) as elected to the office of President of Idar Municipality on the ground that the said decision is in flagrant violation of the provisions of sub-rule (4) of Rule 9 of the Gujarat Municipalities (President and Vice President) Election Rules, 1964 [hereinafter referred as “the Election Rules”].

Special Civil Application No. 24745 of 2005 is filed by Smt Ramiben Ramabhai Parmar, the councillor declared to have been elected as President of Idar Municipality, challenging the vires of sub-rule (4) of Rule 9 of the said Election Rules.

In view of the fact that the subject matter of the two petitions is inter-connected, with the consent of the learned counsel for the parties, the petitions were heard together for final disposal and are being disposed of by this common judgment.

2. The facts leading to filing of these petitions, briefly stated, are as under :-

2.1 For electing the President of Idar Municipality, the meeting of the general body of the Idar Municipality was convened by the Collector, Sabarkantha on 7.9.2005. For presiding over the said meeting, the Collector nominated the Special Land Acquisition Officer at Himmatnagar. At the said meeting, three candidates filed their nominations. All the three nominations were held to be valid and the Election Officer (Special Land Acquisition Officer, Sabarkantha at Himmatnagar) conducted the polling. The 21 councillors present at the meeting voted as under :-

S.No	Name of the Candidates	Description	No. of votes secured
1.	Smt Smitaben Doshi (Resp. No.5 in SCA 22810)	Resp. No. 5	02
2	Smt Shantaben Nanjibhai Patel (Petitioner in SCA 22810)	Petitioner	09
3	Smt Ramiben Ramabhai Parmar (Respondent No.1 in SCA 22810 & petitioner in SCA 24745)	Resp. No.1	10
			21

The Election Officer straightaway declared Smt Ramiben Ramabhai Parmar (10 votes) as having been elected as President of the Municipality and closed the proceedings.

2.2 Smt. Shantaben N Patel (hereinafter referred to as “the petitioner”) submitted application dated 14.9.2005 (Annexure “D”) to the Collector, Sabarkantha District pointing out that the declaration of Smt Ramiben (hereinafter referred to “the first respondent”) as elected to the office of President was contrary to Rule 9(4) of the Election Rules, which lays down the following procedure:-

> “**9. Election**
>
> (4) If more than two candidates have been validly nominated and at the voting on first occasion no candidate obtains more votes than the aggregate votes obtained by the other candidates, the candidate who has obtained the smallest number of votes shall be excluded from the election and the voting shall proceed. The candidate who obtains the smallest number of votes, cast each time shall be excluded from the election until one candidate obtains larger of

> number of votes than that of the votes obtained by the remaining candidates or than the number of aggregate votes of the remaining candidates, as the case may be. The candidate who obtains more votes than those obtained by the remaining candidate(s) or than the aggregate votes obtained by the remaining candidates, as the case may be, shall be declared to have been elected as President".
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> (emphasis supplied)

The petitioner, therefore, requested the Collector to conduct elections to the office of the President of Idar Municipality in accordance with the above Rule, failing which she would be constrained to move the High Court. The Collector, however, sent reply dated 17.9.2005 (Annexure "E") to the effect that the proceedings of the election meeting were in accordance with the provisions of Rule 9(4) of the Election Rules. Thereafter the petitioner filed SCA No. 22810 of 2005 challenging the election of the first respondent to the office of President on the ground of violation of Rule 9(4) of the Election Rules.

2.3 After this Court issued notice for final disposal, the first respondent filed her affidavit in reply dated 16.12.2005. No affidavit has been filed by the Election Officer or the Collector or any other authority. However, the first respondent filed SCA No. 24745 of 2005 challenging the vires of the provisions of Rule 9(4) of the said Election Rules. Hence, both the petitions were heard together for final disposal and are being disposed of by this

common judgment.

3. Mr Vijay Patel, learned counsel for the petitioner has submitted that since the votes secured by the first respondent (10 votes) were less than the aggregate of the votes secured by the other two candidates [9 votes for petitioner plus two votes for the fifth respondent = 11 votes}, as per the provisions of sub-rule (4) of Rule 9, the fifth respondent who had obtained the smallest number of votes was required to be excluded as a candidate from the arena and the voting was to be conducted only for two candidates i.e. the petitioner and the first respondent. The councillor who would then secure a clear majority of votes cast by the total councillors present and voting could be declared as the President of the Municipality. However, the Election Officer did not follow this clear rule and instead declared the first respondent as elected as President merely because she had obtained the highest number of votes out of the three candidates.

4. Neither learned AGP Mr AJ Desai nor Mr Anjaria for the State Election Commission was in a position to defend the decision of the Election Officer or the Collector's reply dated 17.9.2005.

5. Mr ND Nanavati with Mr Hriday Buch,learned counsel for the first respondent was also not in a position to submit that the decision of the Election Officer was in conformity with Rule 9(4) of the

Election Rules, but Mr Nanavati vehemently submitted that the provisions of sub-rule (4) of Rule 9 themselves are unconstitutional and beyond the legislative authority delegated by the State Legislature through the provisions of the Gujarat Municipalities Act, 1963. It was submitted that neither the Constitution nor the Act contain any provision for excluding the candidature of a councillor who has secured the smallest number of votes. It was further submitted that the question whether out of more than two candidates, the candidate securing highest number of votes should be elected as President or whether the candidate securing a clear majority of the votes cast by councillors present and voting should be declared as elected as provided in Rule 9(4) is a policy matter and that in absence of any such policy embodied in the Constitution or in the Municipalities Act, the State Government as a rule making authority acted in excess of the delegated legislative power conferred upon it. Sub-rule (4) of Rule 9 cannot be said to be a mere procedural rule for the meeting as provided in sub-section (2) of Section 32 of the Act.

It was also submitted that in absence of any such similar provision for election of an office bearer in any other local self-government institution like a Municipal Corporation or Nagar Panchayat, Rule 9(4) is also discriminatory and violative of the fundamental rights under Article 14 of the Constitution.

6. The learned AGP and the learned counsel for the State Election Commission were obviously not in a position to support the contention challenging the vires of Rule 9(4) of the Election Rules.

7. Mr Vijay Patel for the petitioner submitted in rejoinder that the provisions of sub-rule (4)of Rule 9 are logical, rational, practicable and workable and are framed in exercise of the power conferred by the Legislature on the State Government through the provisions of sections 31, 32 and 277 of the Gujarat Municipalities Act, 1963. It was also submitted that none of the said statutory provisions are inconsistent with any provision of the Constitution nor is sub-rule (4) of Rule 9 inconsistent with any constitutional or statutory provision.

8. Before dealing with the rival submissions, a reference needs to be made to the relevant constitutional and statutory provisions.

9. **Constitutional provisions**

243R. Composition of Municipalities.-

(1) Save as provided in clause (2), all the seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide -

(a) to (g) ... ...

(h) the manner of election of the Chairperson of a Municipality.

Gujarat Municipalities Act, 1963

31. President and Vice-President.- A municipality shall be presided over by a president who shall be elected by the councillors from among themselves in the manner prescribed by rules made by the Stage Government. There shall be a Vice-President similarly elected for each municipality.

32. Election of President and Vice-President.- (1) After a general election to a municipality the Collector shall call the first general meeting of the municipality for the election of the President and the Vice-President within the prescribed period.

(2) The meeting called under sub-section (1) shall be presided over by the Collector or such officer as the Collector may by order in writing appoint in this behalf. The procedure of the meeting shall be as prescribed by rules made by the State Government and the Collector or such officer shall have such powers as may be prescribed by the said rules but shall not have the right to vote.

(3) No business other than the election of the president and the vice-president shall be transacted at such meeting.

(4) If in the election of the president or the vice-president there is an equality of votes, the result of the election shall be decided by lot to be drawn in the presence of the Collector or the officer presiding in

such manner as the Collector or as the case may be, the officer may determine.

36. Motion of no confidence.-

(1) ... ...

(2) If the motion is carried by a majority of not less than two-thirds of the total number of then Councillors of the municipality, the President or, as the case may be, the Vice-President shall cease to hold office after a period of three days from the date on which the motion is carried unless he has earlier resigned; and thereupon the office held by him shall be declared to be vacant.

277. Powers of State government to make rules-. (1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may be made -

(a) for the whole or any part of the State of Gujarat and for all or any municipality, and

(b) to provide for all matters expressly required or allowed by this Act to be prescribed by rules.

(3) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

(4) All rules made under this Act by the State Government shall be laid for not less than thirty days before the State Legislature as soon as possible after they

> are made, and shall be subject to rescission by the State Legislature or to such modification as the Legislature may make during the session in which they are so laid, or the session immediately following.
>
> (5) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette and shall thereupon take effect.
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> (emphasis supplied)

10. In exercise of the powers conferred by Section 277 read with Sections 31 and 32 of the Municipalities Act, 1963, the State of Gujarat has made "The Gujarat Municipalities (President and Vice President) Election Rules, 1964 ("the Election Rules").

Rule 6 provides for nomination of candidates at the meeting. Rule 8 provides for scrutiny of nominations. Rule 9 is relevant and, therefore, Rule 9 is set out in its entirety.

> "**9. Election .-** (1) If only one candidate has been validly nominated for the office of the President he shall be declared to have been elected as President.
>
> (2) If more than one candidate have been validly nominated for the office of the President, the members present at the meeting shall proceed to elect the President by show of hands.
>
> (3) If two candidates have been validly nominated for the office of the President the candidate who obtains larger number of votes shall be declared to have been duly

elected as President.

(4) If more than two candidates have been validly nominated and at the voting on first occasion no candidate obtains more votes than the aggregate votes obtained by the other candidates, the candidate who has obtained the smallest number of votes shall be excluded from the election and the voting shall proceed. The candidate who obtains the smallest number of votes, cast each time shall be excluded from the election until one candidate obtains larger of number of votes than that of the votes obtained by the remaining candidates or than the number of aggregate votes of the remaining candidates, as the case may be. The candidate who obtains more votes than those obtained by the remaining candidate(s) or than the aggregate votes obtained by the remaining candidates, as the case may be, shall be declared to have been elected as President.

(5) If, at any voting other than final voting there are two or more candidates getting the least equal number of votes, the candidate to be struck off shall be selected by drawing lots.

(6) If at the final voting (at which there are only two candidates), there is an equality of votes, the provisions of sub-section (4) of section 32 shall apply.

(emphasis supplied)

There is no challenge to the constitutionality and legal validity of the provisions of sub-rules (1), (2), (3), (5) and (6) of Rule 9. The challenge is only levelled against the provisions of sub-rule (4).

11. The provisions of Rule 9 have the effect of

providing that the President of the Municipality shall be elected by a clear majority of all the councillors present and voting at the meeting. When there are more than two candidates validly nominated, sub-rules (4) and (5) ensure that there is no fractured verdict. The rationale underlying sub-rules (4) and (5) is to ensure that the President of the Municipality will have the mandate of the clear majority of the councillors so that he can run the municipal administration smoothly. If out of the 21 councillors, only 10 councillors are in favour of the President and the remaining 11 are against the President, the President would not be able to run the administration smoothly as his proposals can be turned down by majority of the councillors present at the meeting where such matters will be decided. We, therefore, find considerable substance in the submission of Mr Vijay Patel in support of sub-rule (4) that the said sub-rule is rational, reasonable, practicable and workable. Even for constituting the council of ministers, the Governor is required to ensure that the person to be invited as the Chief Minister enjoys the confidence of a clear majority of the members of the State Legislative Assembly.

12. Section 31 clearly empowers the State Government to prescribe by Rules the manner of electing the President and the Vice President of a Municipality. Rule 9 including sub-rules (4) and (5) thereof clearly prescribes the manner of such election as contemplated by Section 31. The

provisions of sub-rule (4) of Rule 9 are, therefore, not inconsistent with any of the provisions of the Act. Moreover, ordinarily, unless the statute provides otherwise, an elected office bearer of a public body may be removed from the office by a motion of no confidence passed by a simple majority. Section 36 of the Gujarat Municipalities Act, 1963, however, provides for a special majority of two-third councillors present and voting for passing a motion of no confidence. Hence, it would be incongruous to accept the petitioner's contention that even though the President can be removed by a motion of no confidence passed by only a special majority of two-third councillors present and voting, such a President can in the first place be elected by less than a clear majority of councillors present and voting at the meeting. Sub-rules (4) and (5) of Rule 9 of Rules for election of President and Vice-President of Municipalities have to be read in the background of the scheme of the Gujarat Municipalities Act which provides for a special majority of two-third councillors present and voting for passing the motion of no confidence against an elected President/Vice-President. Hence, absence of any provision similar to Rule 9(4) in the Election Rules for electing office bearers of other local self-government institutions cannot be a ground for striking down Rule 9(4) as arbitrary. Even otherwise, in absence of any specific rules for elections to such office in such local self-government institutions having been brought to our notice, we

would not like to express any opinion, but assuming that the Rules for the Mayor/President of a Municipal Corporation/Nagar Panchayat are different, that would not mean that the provisions of Rule 9(4) can be considered as discriminatory. All the municipalities in the State of Gujarat are required to follow the same Rules in the matter of elections to the office of the President and Vice President and we fail to appreciate how any other provision in any other Rules for other urban local self-government institutions can be considered as having any bearing in testing the constitutionality and validity of the provisions of Rule 9(4) which have stood the test of constitutionality and legality as discussed above.

13. As regards the submission of Mr Nanavati that sub-rule (4) is a policy rule going beyond the provisions of the Constitution and the Act, it is not possible to accept this contention because there is no provision in the Constitution or the Gujarat Municipalities Act providing that at the elections of the office bearer of a municipality, when there are more than two candidates, the candidate securing the highest number of votes shall be declared as elected. The latter rule may be adopted as a practical rule in the matter of elections of Councillors or Members of a Legislative Assembly or Parliament where an immensely large number of voters are involved in the polling exercise. However, it does not follow that when there are more than two candidates for one office, electing a representative who has secured the

highest number of votes (without a clear majority) out of the votes cast in favour of all the candidates by a small electorate is the only reasonable and rational rule.

It is necessary to note at this stage that the first respondent with 10 votes has not challenged any of the provisions of the Gujarat Municipalities Act as vitiated by excessive delegated legislation. The challenge is only made to the provisions of sub-rule (4) of Rule 9 of the Election Rules. So also it is pertinent to note that the fifth respondent who secured only two votes in the election held on 7.9.2005 has herself not filed any petition challenging the provisions of Rule 9(4) or any other provisions of the Election Rules.

14. As regards the contention that even if two policy options were available to the rule making authority, the Government as a rule making authority could not have opted for one as against the other without any express legislative mandate, the contention deserves to be rejected for the simple reason that Section 277 conferring rule making power on the State Government makes it subject to the condition of the Rules being made after previous publication and also subject to laying before the State Legislature for atleast thirty days after the rules are made. The said rules are also subject to such rescission or modification as the State Legislature may make during the session in which they

are so laid, or the session immediately following. Any such rescission or modification which may be made by the State Legislature is to be published in the official gazette and shall thereupon take effect.

It is now well established that laying with immediate effect but subject to annulment (i.e. rescission/modification) or what is known as “the negative resolution” method is the most common legislative procedure for legislative control of delegated legislation [vide Administrative Law by Hon'ble Mr Justice CK Thakker, Chapter 5 – Part 3, Pages 150-153]. Hence, the State Legislature must be taken as having approved or atleast as not having disapproved the Gujarat Municipalities (President and Vice President) Election Rules, 1964 including sub-rules (4) and (5) of Rule 9 thereof.

15. Nowhere has the first respondent (Smt Ramiben) pleaded in the memo of her petition (SCA No. 24745 of 2005) that the Gujarat Municipalities (Election of President and Vice President) Rules, 1964 were not laid before the State Legislature or that there was no compliance with the provisions of Section 277 of the Act. In view of the above, it is clear that when the Legislature conferred power on the State Government to make rules prescribing the manner of election of President and Vice President of the Municipality and after the Election Rules were made and laid before the State Legislature, the State Legislature thought it fit not to make any rescission

of, or modification to, any provision of Rule 9 of the said Rules, the State Legislature must be taken as having approved of the policy contained in sub-rules (4) and (5) of Rule 9 embodying the principle that the President must be elected by a clear majority of the councillors present and voting and thus there shall not be any fractured verdict.

16. Mr Nanvati also submitted that the petition suffers from delay, latches and acquiescence as the petitioner chose to wait for more than one month after the election results were declared on 7.9.2005. It was submitted that the delay was deliberate and mala fide in order to manipulate and win over other councillors.

17. Mr Vijay Patel submitted that apart from the magnitude of the illegality, petitioner Shantaben is not an educated lady and had no such experience in the past, when the Election Officer himself declared the results and the Collector also confirmed the decision of the Election Officer, the petitioner had to take appropriate legal advice before taking the decision to file the petition in the month of October, 2005 and that, therefore, there is no delay, latches or acquiescence in filing the petition.

Moreover, neither the Gujarat Municipalities Act nor the Election Rules for President and Vice-President of the Municipality provide for any machinery or forum for determining the disputes

relating to election of President and Vice-President of the Municipality. Resort to the remedy of a civil suit would mean a long drawn out process and the term of the elected President would also run out during such along battle. Hence, the petitioner took some time to consider all these aspects and it was only thereafter she got legal advice to file the present petition before this Court under Article 226 of the Constitution.

18. We find substance in the submission of Mr Patel that the illegality is so patent and so gross that the period of a little longer than one month taken by petitioner Smt Shantaben to move this Court cannot be considered unreasonable in the facts and circumstances of the case.

19. In view of the above discussion, Special Civil Application No. 24745 of 2005 filed by Smt. Ramiben Ramanbhai Parmar challenging the vires of Rule 9(4) of the Election Rules is dismissed.

Rule is discharged.

20. Special Civil Application No. 22810 of 2005 filed by Smt. Shantaben Nanjibhai Patel is allowed. The decision dated 7.9.2005 of the Election Officer declaring first respondent - Smt Ramiben Ramabhai Parmar as having been elected as President of the Idar Municipality is hereby quashed and set aside. So also the reply dated 17.9.2005 of the Collector,

Sabarkantha at Himmatnagar (Annexure “E”) is quashed and set aside. The third respondent-Collector, Sabarkantha is directed to proceed for conducting elections to the office of President of Idar Municipality in accordance with the provisions of Rule 9 after excluding the fifth respondent (Smt Smitaben D. Doshi - who had secured only two votes at the elections held on 7.9.2005) and to ensure that the elections to the office of the President, Idar Municipality are now conducted, within two weeks from today, in accordance with the provisions of Rule 9 of the Gujarat Municipalities (President and Vice-President) Election Rules, 1964 by requiring the councillors of Idar Municipality to vote in favour of either petitioner Smt Shantaben or first respondent Smt Ramiben.

Rule is accordingly made absolute to the aforesaid extent.

[M.S. SHAH, J.]

[SHARAD D. DAVE, J.]

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